Supreme Court, U.S.
FILED
05111 MAR 1 - 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KERRY L. MORGAN

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit Court of Appeals erred as a matter of law by affirming the District Court's ruling requiring Petitioner to first exhaust his administrative remedies before seeking judicial review, where the plain and unambiguous terms of 18 U.S.C. § 923(d)(2) authorizing mandamus pursuant to 28 U.S.C. § 1361 do not dictate such a requirement.

II. In the alternative, whether the Sixth Circuit Court of Appeals erred as a matter of law by upholding the District Court's ruling where failing to acknowledge that at the point in time Petitioner filed his Petition for mandamus relief, he enjoyed no administrative remedies to be exhausted because the ATFE had failed to either deny or approve his application as required by 18 U.S.C. § 923(d)(2).

PARTIES TO THE PROCEEDING

The Petitioner is Kerry L. Morgan, an individual.

The Respondent is the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit nullifying Petitioner's statutory right to obtain mandamus against the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE). This Court has never decided a case regarding the Congressional remedy of mandamus in connection with the ATFE's failure to timely act upon an application for a Federal Firearms License.

OPINIONS BELOW

The unpublished Bench Decision and Order of the Sixth Circuit Court of Appeals are reproduced in the Appendix to this Petition ("App.") at 1a-2a, App. A. The unpublished decision of the United States District Court is reproduced in the Appendix to this Petition at 3a-10a, App. B.

JURISDICTION

The District Court issued its opinion on June 23, 2004. The United States Court of Appeals for the Sixth Circuit issued its opinion on December 2, 2005, docket 04-1933. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) which provides that cases in the courts of appeals may be reviewed by the Supreme Court "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 923(d)(2) states:

> The Attorney General must approve or deny an application for a license within the 60-day period beginning on the date it is received. If the Attorney General fails to act within such period, the applicant may file an action under section 1361 of title 28 to compel the Attorney General to act. If the Attorney General approves an applicant's application, such applicant shall be issued a license upon the payment of the prescribed fee.

28 U.S.C. § 1361 states:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

STATEMENT OF THE CASE

Petitioner asks this Court to grant its petition for a writ because the United States Court of Appeals has wrongly decided an important question of federal law that has not been, but should be, settled by this Court. The Sixth Circuit Court of Appeals wrongly required Petitioner to first exhaust his administrative remedies where the statutes in question imposed no such requirement. Title 18 U.S.C. § 923(d)(2) in plain and unambiguous language granted Petitioner the remedy of mandamus pursuant to 28 U.S.C. § 1361. It says nothing about exhaustion of remedies.

Simply put, the statute grants mandamus. It says nothing about exhausting administrative remedies. Congress gave a remedy. The Courts took it away. Congress says that Petitioner has this remedy. The Courts and Executive branch say: "No he doesn't." The Court added a few lines to the law. The Court exercised a legislative power. The Court amended the statute. The Court did so because case law says it can do so. But the decisions of Courts cannot change the authority of Courts to exercise only judicial power. Case law cannot expand judicial power into legislative authority. The Court's addition of an exhaustion of remedies criteria to either 18 U.S.C. § 923(d)(2) or to 28 U.S.C. § 1361 is a legislative act.

Simply because the judicial mind has accepted the prerogative of a superior legislative authority, does not mean that this Court and its Constitutional obligation to maintain a strict separation of powers must sit idly by.

This case is one of first impression as far as the underlying statutory invocation of mandamus articulated in 18 U.S.C. § 923(d)(2) is concerned. There are no cases on point, reported or otherwise, for a good reason. The reason is that similarly situated petitioners do not believe they have any chance of success in filing mandamus actions because the Court's legislative exhaustion of remedies criteria effectively destroys the remedy which Congress has given. The Court's criteria makes the statutory remedy a sham. The petition should be granted to affirm that Courts do not have legislative power to add clauses to this remedial statute and that their construction of this statute should not render its mandamus remedy meaningless.

I. Factual Background.

The factual background for this writ is as follows. Petitioner has held a Type 01 federal firearms license as a dealer in Michigan since 1993. A Type 01 deal is authorized to generally transport, ship and receive long guns and pistols .50 caliber or less, in interstate and foreign commerce. It also entitles a dealer to make retail sales of said firearms to the general public, and keep certain required records of transfers subject to other restrictions not herein applicable. A Type 01 dealer's license expires every three years unless renewed by the ATFE.

Petitioner timely sought renewal of his license every three years in 1994, 1997, 2000 and 2003. The Agency inspector made an inspection of Petitioner's premises each renewal period. The license was promptly renewed in 1994, 1997, and 2000.

On or about June 26, 2004, Petitioner submitted a timely application for renewal of his federal firearms license as a Type 01 dealer to the ATFE in the usual manner. More than 60 days passed, however, since the Petitioner applied for his renewal and the Agency failed to act upon the application. On October 6th 2003, Petitioner filed a mandamus petition in federal court to compel the issuance of a license under 18 U.S.C § 923(d) Finally, on November 24th 2003, the Agency issued a Notice of Denial Application for License. The Agency took almost five months rather than 60 days to make a determination on the license application - a license which it had three times previously reissued without incident.

In order to preserve his rights but without prejudice to his mandamus petition, the Petitioner then sought review of the administrative denial under 18 U.S.C. §§ 923(f)(1) and (f)(2)

which involves a hearing on the denial. If not satisfied with the result of the administrative hearing, then Petitioner is entitled to *de novo* judicial review in the District Court as provided in 18 U.S. § 923(f)(3). An administrative hearing with *de novo* judicial review under 18 U.S.C. § 923(f)(3) however, is a materially different proceeding than a mandamus petition under 28 U.S.C. § 1361. In a *de novo* proceeding, the Petitioner carries the burden to show that he is qualified to obtain the license. In a mandamus proceeding, the ATFE must show cause why the license should not be issued. The District Court erred in no drawing this distinction.

The reason the ATFE advanced for the denial of Petitioner's application is not at issue in this Writ of Certiorari. It involves a dispute over the meaning of the zoning law in effect in Petitioner's Township. What is relevant to this appeal is that the dispute over the meaning of the zoning ordinance should have been decided in a show cause hearing in a mandamus proceeding, rather than considered in an administrative proceeding subject to *de novo* judicial review. It should have been so decided because Congress took care to authorize mandamus relief and allow an applicant their choice of forum and relief where the government fails to timely act.

II. Proceedings Below

The District Court held that the government can avoid a mandamus writ suit even after it is filed simply by denying the license beyond the 60-day window. In other words, the government can avoid mandamus relief by belatedly acting upon Petitioner's application to renew his Federal Firearms License (FFL): 1) even though the government failed to timely act as required by 18 U.S.C. § 923(d)(2); 2) even